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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of) MM Docket No. 91-100
)
Amendment of Section 73.202(b)) RM-7419
Table of Allotments)
FM Broadcast Stations) RM-7797
(Caldwell, Texas, et al)) RM-7798

To: The Commission

REPLY TO
OPPOSITION TO MOTION TO STRIKE

On November 24, 1999, Bryan Broadcasting License Subsidiary, Inc. ("Bryan") filed a pleading styled as a "Supplement To Comments On Remand". On December 8, 1999, Roy E. Henderson ("Henderson") filed a Motion to Strike that pleading, and on December 20, 1999, Bryan filed an Opposition to that Motion to Strike. The instant Reply is hereby filed to that Opposition.

I. Bryan's Repeated Unauthorized Pleadings

In his Motion to Strike, Henderson had pointed out that by the Commission's own rule in this case, no information submitted by any party after May 14, 1999, would be of any decisional significance in this proceeding. Nonetheless, Bryan continues to lard the record of this case with its repeated proposed changes in its antenna site (it is now on its fourth such proposed site). As pointed out by Henderson in his Motion to Strike, it does not matter what new actions Bryan may take or seek to propose to the Mass Media Bureau as to its site du jour.

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While the Mass media Bureau may indeed encounter its own problems in dealing with the deceptions that Bryan has made to them in the course of its various applications, whatever Bryan may now be proposing as a change in its original proposal, it means nothing to this proceeding before the Commission. For this proceeding, Bryan's proposal is what it said it was in July of 1997, as it stood through the Commission's flawed Decision of July of 1998, and as it continued to stand through the remand of this case from the Court of Appeals back to the FCC in March of 1999.

The fact that Bryan's defect was finally recognized at that point has led Bryan to scurry about since then, seeking to 'fix it up' by finding a new site to use for purposes of the FCC's new Decision. As already pointed out by Henderson in this case, any recognition of any such new proposed ex post facto changes by Bryan in this proceeding would be an appalling violation of administrative due process as well as common sense, and could not in any event be recognized or allowed.

Bryan's continued filings in its desperate attempts to change its site (two such proposed new sites just since the time of the Court remand in March of 1999) have unnecessarily burdened the record of this case and for the reasons indicated in the Motion to Strike, should not be tolerated. By the Commission's own definition, nothing filed since May 14, 1999, could in any event be deemed to be of decisional significance in this case, and the case should be decided now, without further delay, based

upon the facts of record at the time of the Commission's last Decision of July 22, 1998, which was remanded back to the Commission for further review by the Court of Appeals in March of 1999.

As to Bryan's attempts to conveniently bifurcate this proceeding between rulemaking and application phases and to ignore the inextricably combined nature of the two, this itself leads into the more serious matter of Bryan's misrepresentations. The base of the matter is that Bryan was very comfortable in telling one part of the Commission (the Allocation Branch) that it was in full compliance with the city grade coverage requirements of 73.315(a) while confiding to the Mass Media Bureau 1/ that it really intended to violate that rule by a substantial amount. Even after the cat was out of the bag on this, Bryan felt comfortable that it could still get away with its scheme, and continued to feel comfortable about that for almost two years until the case was remanded back to the Commission by the Court of Appeals for the very purpose of examining this matter. Ever since, Bryan has been desperately trying to change the facts of its case to try to 'make it right again' for purposes of the rulemaking decision. There is no way

1/ It is interesting to note that while Bryan now feels compelled to share all of its recent filings with the Commission, it did not feel so "compelled" to do so in the case of its application that first disclosed its violation of 73.315(a), which was only brought to the Commission's attention by Henderson in his Second Supplement pleading as filed on September 29, 1997.

consistent with simple equity or administrative due process that that could be done.

II. Bryan's Deceptions and Misrepresentations Of Record

Finally, we must note that in Section II of its Opposition, Bryan suggests that it "cannot be accused of misrepresentation or a lack of candor". Aside from its own "wishing may make it so" conclusions, Bryan offers no basis for that rather bizarre assertion. On the contrary however, the facts of record in this case conclusively indicate exactly the opposite: There is no way to escape the fact that Bryan has not only made deliberate misrepresentations of material facts in this case in an effort to mislead the Commission, but that it has also deliberately tried to cover up those misrepresentations. Again, we will not repeat the full indictment here but will refer the Commission to the pleading filed by Henderson on June 18, 1999 entitled "Reply Comments in Response to Comments of Bryan Broadcasting License Subsidiary, Inc., and FCC Order DA 99-1050 Subsequent to Judicial Remand", which provides a full description and factual basis for concluding that Bryan has in fact engaged in multiple deliberate misrepresentations and deceptions, as well as subsequent attempts to cover-up and conceal those misrepresentations and deceptions in this proceeding.

In the face of those FACTS which establish the deliberate deceptions by Bryan, Bryan in its Opposition seeks to dismiss everything as "innocent mistakes". We will resist the temptation to again review the deliberate deceptions by chapter and verse

here but only taking just one for example, how could Bryan "innocently" tell the Commission in not one but TWO applications filed on January 21, 1997 that Bryan itself was building a new tower, relying upon that "new tower" assertion to show full compliance with 73.315(a) AND relying upon the expense of its construction of that new tower that it was building to seek a long extension on the time to actually construct the tower, to a point after the case had become final, only to be forced to admit in a pleading filed with the Mass Media Bureau on June 7, 1999

2/ that those representations had never been true, that Bryan itself had never intended to build a new tower, that the fact was, at best, it may have spoken to someone else about leasing space on a new tower that that person was considering to build.

3/

The claim of any "innocence" on this misrepresentation is barred by not one but two factors. In the first place, the same individual who participated along with the President of Bryan in preparing the representations in the two applications filed in January of 1997, affirming that it was Bryan building the new tower, is the very same person who filed a Declaration in Bryan's

2/ Again, Bryan did not seem to feel "compelled" to share with the Commission this extraordinary pleading by Bryan in which it was finally forced to address the deceptions that had been raised by Henderson, but it was submitted to the Commission in full by Henderson as "Attachment One" of Henderson's own Reply Comments filed with the Commission on June 18, 1999.

3/ There is even a question as to that since the other person did not seem to be sure of Bryan's interest, built a new tower without saying anything more to Bryan, and Bryan never raised the question again with him even after the tower had been constructed.

June 7, 1999 "Opposition" that that was never the case, that Bryan never intended to build its own tower, claiming there that it had only hoped to lease space on someone else's tower. It is simply impossible to reconcile these two mutually inconsistent representations by the same person. One must be an intentional deception and it is impossible under these factual circumstances to find it as "innocent". Moreover, the motives for the deceptions to show full compliance with 73.315(a) in one application and to seek a long extension of time in the other (based upon the heavy costs of that tower construction) are as patent as they are palpable.

Furthermore, beyond the plain meaning of the words in the representations included in the two January, 1997, applications, there is this: Subsequent to the filing of those two applications, Henderson filed his Second Supplement pleading on September 29, 1997, which spoke at length as to the 'proposed new tower construction by Bryan' that had been represented in those applications. Although Bryan filed an Opposition to the Second Supplement, it offered no "correction" as to the statements in its January, 1997 applications and the perception and recognition of the plain meaning of those statements. Those statements specifically represented, without qualification, that Bryan was proposing to build a new tower, Henderson in his pleading referred directly to those representations and Bryan offered no correction whatsoever, leaving the representations as they were, that Bryan itself had represented to the Commission that they were proposing to build a new tower. And they left that

misrepresentation as it was and concealed it 4/ for almost one and one-half years of time until June of 1999, when they were virtually compelled to reveal the deception in response to Henderson's pleading to the Mass Media Bureau. This was not simple ineptness, not sloppiness, not negligence, and by any measure of the facts as now known, certainly not "innocent". And this is only one example of the several misrepresentations documented in Henderson's Reply Comments as filed with the Commission on June 18, 1999.

Given the depth and factual documentation of these misrepresentations by Bryan, along with the obvious motives for such deceptions, it is difficult to imagine how they could not be a matter of serious concern for the Commission, if not for the Court. In that respect we are also constrained to note the light and humorous approach taken by Bryan on this matter. According to Bryan (at page one of its Opposition), it has found the discussion of the matter to be of substantial "entertainment". Perhaps we are expected to forgive that as merely the predictable reaction of someone "whistling past the graveyard", but given the facts of Bryan's misrepresentations and deceptions here, it certainly evinces no contrition, and instead stands as an "in your face", "so what" approach that is itself reprehensible.

4/ As noted by the U.S. Supreme Court in FCC v. WOKO, 329 U.S. 223, 227 (1946), "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deception as well as by material and persuasive ones." In the instant case it is obvious that the deception was meant to be material and persuasive.

We are also unaware of any instance where the Commission or the Court has referred to discussion of such a serious matter as "entertainment". Indeed, Bryan's casual and lighthearted approach stands in stark contrast to the Commission's own view on the matter where it has characterized "misrepresentation and lack of candor in an applicant's dealing with the Commission as serious breaches of trust [affecting] the integrity of the commission's processes" Character Qualifications, 102 FCC 2d at 1211. We are not aware of any subsequent holding by the Commission that consideration of such serious matters have any "entertainment" value.

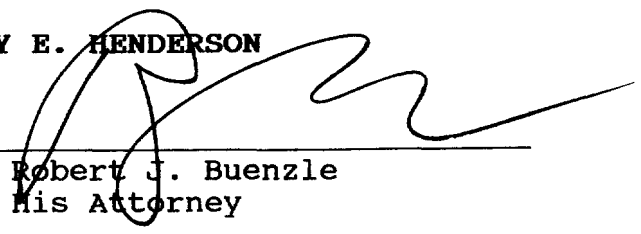
III. Conclusion

Wherefore, Roy E. Henderson submits that the Commission has the facts necessary to determine this case and we earnestly request that it proceed to do so. Consistent with its own rules in this case, it should not further delay that Decision based upon the spurious and unauthorized pleadings filed by Bryan.

Respectfully Submitted,

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by


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January 5, 2000

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing REPLY TO OPPOSITION TO MOTION TO STRIKE have been served by United States mail, postage prepaid this 5th day of January, 2000, upon the following:

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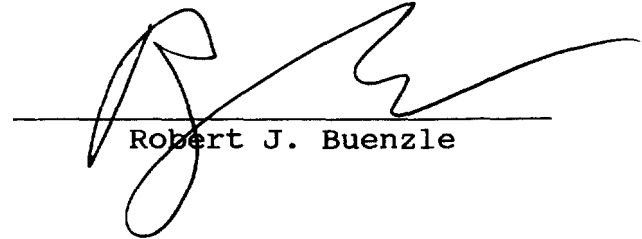
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